Wangsa Timber Industries Sdn Bhd & Ors v Adulfast Anthony Robert Ignatia Lee

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO S–02–631 OF 1995
NH CHAN, ABU MANSOR AND MOKHTAR SIDIN JJCA
19 SEPTEMBER 2001

Civil Procedure *— Appeal — Appeal on counterclaim dependant on main action — Parties agreed that only where appellants succeed in main suit that issue on appeal on counterclaim shall be determined — Whether any basis for appellants to proceed with present appeal when appellants' appeal on main action was dismissed*

The appellants appealed against the decision of the trial judge who had dismissed the appellants' counterclaim for damages. The appellants' counterclaim hinged on the claim by the respondents in the main suit as to their entitlement for easement of right of way. The parties had agreed that only in the case where the appellants succeed in their appeal in the main suit that the issue in respect of this appeal shall be determined.

Held, dismissing the appeal:

In respect of the appeal in the main suit, the court gave its decision in favour of the respondents whereby the appeal by the appellants was dismissed with costs. Thus, there was no basis for the appellants to proceed with the present appeal because this appeal was on the assumption that the appellants succeed in their claim for injunction and damages caused by the trespass (see p 460C–D).

[**Bahasa Malaysia summary**

Perayu-perayu mengemukakan rayuan terhadap keputusan hakim perbicaraan yang telah menolak tuntutan balas perayu-perayu untuk ganti rugi. Tuntutan perayu-perayu berlandaskan tuntutan oleh penentang-penentang dalam guaman utama berkenaan hak mereka untuk easement hak laluan. Pihak-pihak telah bersetuju bahawa hanya dalam kes di mana perayu-perayu berjaya dalam rayuan mereka dalam guaman utama bolehlah isu berkaitan dengan rayuan ini diputuskan.

Diputuskan, menolak rayuan tersebut:

Berkenaan rayuan dalam guaman utama, mahkamah memberi keputusannya memihak kepada penentang-penentang yang mana rayuan oleh perayu-perayu ditolak dengan kos. Justeru itu tiada dasar untuk perayu-perayu meneruskan rayuan ini kerana ia adalah berdasarkan andaian bahawa perayu-perayu akan berjaya dalam tuntutan mereka untuk injunksi dan ganti rugi akibat pencerobohan (lihat ms 460C–D).]

Notes

For cases on appeal generally, see 2(1) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 526–1264.

Appeal from: Suit No K22–178 of 1994 (High Court, Kota Kinabalu)

Marina Tiu (*Yap Chin & Tiu*) for the appellants.
Clement Skinner (*Skinner Lind Willie Wong & Chin*) for the respondents.

Mohktar Sidin JCA (delivering judgment of the court):**.** This is an appeal by the appellants who are the defendants in the court below against the decision of the learned judge of the High Court, Kota Kinabalu who had dismissed the appellants' counterclaim for damages. The appellants' counterclaim is found in the amended statement of defence dated 5 January 1995 to Civil Suit No K22–178 of 1994 filed by the respondents. The counterclaim stated as follows:

COUNTERCLAIM

The defendant repeat paras 1 to 9 of the defence.

Since sometime in December 1994, the plaintiffs' agent whose name is unknown to the defendants until discovery herein, have caused annoyance to the defendants' workers by habitually parking his car at the entrance to the defendants' land thus obstructing the way into the defendants' land and refusing to remove the said car despite requests made to him.

The obstruction has caused great hardship and inconvenience to the defendants and their servant or agent in that it prevents and/or hinders the delivery of building materials to the actual building site.

Further, the plaintiffs have trespassed and/or encroached (and continues to do so) into the defendants' land in that part of their garden which is sited beyond the shared boundary line into the north eastern side of the defendants' land.

Unless restrained, the plaintiffs intend to continue their trespass or encroachment onto the defendants' land and their obstruction of the access to the defendants' land as aforesaid.

And the defendants' counterclaim against the plaintiffs for:

(1) a declaration that they are entitled to the exclusive possession, use and enjoyment of the defendants' land, Country Lease No 015276409 save and except for the right of way registered under Memorial No 87163 in the Central Land Registry, Kota Kinabalu;

(2) a further declaration that the plaintiffs' right of way over the defendants' land, Country Lease No 015276409, is that as stated in the registered right of way under Memorial No 87163 and not anywhere else on the defendants' land aforesaid;

(3) an order to compel the plaintiffs whether by themselves, their agents or servants and at their costs to cease or remove the trespass or encroachment on the defendants' land, Country Lease No 015276409;

(4) an injunction to restrain the plaintiffs, whether by themselves or by their servants or agents or whosoever from trespassing on the defendants' land or obstructing or impeding in any manner whatsoever the entrance or access to the defendants' land, Country Lease No 015276409.

It is clear that the appellants' counterclaim hinges on the claim by the respondents in the main suit as to their entitlement for easement of right of way. It was made clear to us by the parties that if the respondents succeeded in their main claim for easement of right of way, then the counterclaim by the appellants is doomed to failure. The learned judge in respect of the main suit found in favour of the respondents whereby the respondents had established easement in respect of the access road. Being dissatisfied with that decision the appellants appealed to this court.

As agreed by the parties, the appeal in respect of the main suit, ie the issue whether the respondents had acquired an easement of right of way be first determined and only in the case where the appellants succeed in their appeal in the main suit, then the issue in respect of this appeal shall be determined. In respect of the appeal in the main suit (Civil Appeal No S–02–637–1995), we gave our decision in favour of the respondents whereby the appeal by the appellants was dismissed with costs.

When we dismissed the appeal in respect of Civil Appeal No S–02–637–1995, Ms Marina Tiu was kind enough to concede that there was no basis for her to proceed with the present appeal because this appeal was on the assumption that the appellants succeed in their claim for injunction and damages caused by the trespass.

In view of the concession by the learned counsel, this appeal is hereby dismissed. We are of the view that the concession by the learned counsel was well taken and that the counsel for the respondents did not press for costs. We make no order as to the costs in this court in respect of this appeal. The deposit is to be refunded to the appellants.

My learned brother, Abu Mansor JCA, who has the opportunity of reading this judgment in draft, has expressed his concurrence with this judgment.

Appeal dismissed.

Reported by Jafisah Jaafar